

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1941.

No. 7813

740

LOUIS W. RAPEER, APPELLANT,

vs.

GLADYS P. RAPEER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED JANUARY 18, 1941

PRINTED APRIL 7, 1941

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1941.

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vs.

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THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

A. District Court of the United States
For the District of Columbia

Civil Action No. 2829

GLADYS P. RAPEER, *Plaintiff*,

vs.

LOUIS W. RAPEER, *Defendant*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Complaint for Limited Divorce*
(Cruelty)

Filed May 22 1939

In the District Court of the United States
For the District of Columbia

Civil Action No. 2829

GLADYS P. RAPEER, 1304 Rhode Island Ave., N. W.,
Plaintiff,

—vs—

LOUIS W. RAPEER, 1607 Eye Street, N. W., *Defendant*.

The plaintiff, Gladys P. Rapeer, complains to the Court against the defendant, Louis W. Rapeer and for cause respectfully alleges the following:

*

*

*

5. About three years ago the defendant became cruel and abusive and at one time kicked the plaintiff as she lay in bed and threatened then and at other times to beat her.

Plaintiff found herself in a state of great fear of bodily injury at the hands of the defendant. Defendant became stingy and declined to supply the plaintiff with necessary funds for the conduct of her household in the comforts of which defendant shared. Plaintiff was compelled to purchase a furnace for the home from her earnings as a teacher which she had saved, paying therefor \$400.00, which funds he refused to supply. At another time plaintiff gave \$100.00 to defendant to purchase office equipment for his personal use. On another occasion plaintiff supplied defendant with \$400.00 from her personal savings not earned or acquired from her marriage to pay upon an account of overdue alimony, under an order of court, and payable to a former wife and by so doing plaintiff prevented the defendant from being punished for contempt of court.

6. Plaintiff and defendant conducted a rooming house at 1607 Eye Street, N. W. in Washington in the District of Columbia. From the joint undertaking there resulted a savings fund of profits amounting to \$1,000.00. Defendant was the head of an alleged school or university known as the Research University and he deposited the \$1,000.00 to the credit of the university, explaining afterward to plaintiff that he did so to prevent the sum being seized to satisfy the overdue alimony under court order in favor of his first wife from whom he had been divorced. Subsequently plaintiff acquired the premises of the late Dr. D. Percy Hickling at 1304 Rhode Island Avenue, Northwest, making most of the down payment from a legacy that came to her from her grandmother Mrs. A. D. Perkins. Some of the money was contributed by her father, Jesse Pope, to the amount of about \$800.00.

* * *

Wherefore the premises considered the plaintiff prays:

* * *

2. That upon final hearing the plaintiff be awarded a decree of divorce a mensa et thoro, and permanent alimony and court costs and counsel fees.

* * *

GLADYS P. RAPEER

JERRY A MATHEWS
Attorney for Plaintiff.

District of Columbia, ss:

Gladys P. Rapeer, being first duly sworn on oath, deposes and says that she has read the foregoing complaint by her subscribed, and knows the contents thereof; that the matters therein stated of her own knowledge are true and those made upon information and belief she believes to be true.

GLADYS P. RAPEER

Subscribed and sworn to before me this 19th day of May, 1939.

ELSIE L. LEISHEAR

(Seal)

Notary Public, D. C.

My commission expires Jan. 16, 1944.

HARRY J. DALY

3 *Answer and Counter Claim of Defendant to
the Rule and Complaint*

Filed June 2 - 1939

*

*

*

Second Defense Counter-Claim

Prior to October 19, 1938, plaintiff and defendant decided and agreed that they would buy some good property to be used as a rooming house and a home for them and a home and office for the defendant all of his life. After he had investigated other properties, they decided to purchase the premises 1304 Rhode Island Avenue, N. W., as tenants by the entirety, for the sum of \$10,600; and on that day they executed a contract for the purchase of the said property and deposited \$500.00, agreeing to pay an additional \$1,500.00 on the date of the conveyance. A copy of the said contract showing the purchase of the plaintiff and defendant as tenants by the entirety duly executed by them and by Harriett Stone Hickling and D. Percy Hickling, the sellers, is made a part hereof as Exhibit A.

The agreement between the plaintiff and defendant that they should own the property as tenants by the entirety also covered the furnishings and fixtures of the said property. The defendant at the time of the purchase and a little later paid on the said property about \$1,500 in cash of his own money, no part of which was earned by the joint

efforts of the plaintiff and defendant. A day or two later, Jesse E. Pope, father of the plaintiff, "butted into" the transaction and claimed that if the property were conveyed to the plaintiff and defendant as tenants by the entirety, the defendant's former wife might make some claim for alimony. Thereupon, the plaintiff and defendant agreed that the property could be put into the name of the plaintiff, who was in effect to hold it as a trustee for the benefit of the plaintiff and defendant as tenants by the entirety, and

4 the plaintiff was to make a will devising all her property to the defendant and to execute an agreement that she would not convey or encumber the said premises or the contents thereof without the written consent of the defendant, and the defendant had already made a will devising all of his property to the plaintiff. On October 24, 1938, the plaintiff and defendant in writing instructed the real estate brokers, Shannon and Luchs, to have the deed made to Anne Pope Rapeer, a copy of which instruction is filed herewith as Exhibit B as part of the answer and counter claim.

Thereafter the defendant prepared the said contract for the plaintiff to sign and a will for the plaintiff to sign. Thereupon, after months of delay, the said Jesse Pope persuaded the plaintiff not to sign either the will or the contract, by noon Feb. 20, 1939.

In addition to the \$1,500 in cash, the defendant put into the premises 1304 R. I. Avenue, N. W. furniture and fixtures which he owned or which he purchased to the value of approximately \$280.00 and also had about seventeen mechanics who were his employees working on the above premises for a considerable time. The plaintiff moved into the premises and has occupied an apartment or a room for her living quarters, which are separate and distinct from the other rooms and apartments of the said rooming-house, known as premises 1304 R. I. Ave., N. W. Since Feb. 20 the defendant has not entered the living quarters of the plaintiff at 1304 R. I. Avenue, N. W. except on one occasion when he asked her to decide then and there about a reconciliation, and she said that she would give him a reply by the next Monday noon. Defendant did not force himself into the said room nor did he threaten or mistreat the plaintiff in any manner. He merely stood at the door and repeated his plea for an unequivocal and final answer. The

5 plaintiff and defendant are in law and equity the owners as tenants by the entirety of the said premises, 1304 R. I. Ave., N. W., and of all the furniture and fixtures therein; and the defendant is entitled to enter and leave these premises at any and all times that he may feel so inclined and may be proper for the protection of the property and the carrying on of the business successfully. The defendant, as husband of the other joint tenant, is entitled to the rents and profits from the property. The monthly rental value of 1304 R. I. Ave., N. W., has averaged approximately \$200.

Wherefore, the defendant is entitled to and prays that the Court:

(1) Enter an order declaring on the record that the plaintiff and defendant are owners as tenants by the entirety of the said premises 1304 R. I. Ave., N. W., Washington, D. C., and all the furniture, fixtures, and appliances therein, and that the defendant is entitled, as the husband of the plaintiff, to all the rents and profits from the said premises.

(2) Enter an order discharging the rule, denying the legal separation or limited divorce and denying an injunction and alimony and attorneys fees.

(3) Enter an order granting the defendant all other relief to which he may be entitled.

LOUIS W. RAPEER.

HUDSON, CREYKE & HUDSON

By RAYMOND M. HUDSON

Attorneys for Defendant

District of Columbia to wit:

I, Louis W. Rapeer, being first duly sworn, depose, and state that I am defendant in the above action; that I have read and signed the foregoing answer and counter-
6 claim, and that the facts stated therein are true to the best of my knowledge, information, and belief.

LOUIS W. RAPEER.

Subscribed and sworn to before me this 1st day of June, 1939.

CHARLES E. STEWART,
Clerk.

By ELEANOR E JOBE
Asst. Clerk

Exhibit "A"

Shannon & Luchs Company
Realtors
1505 H Street, Northwest
Washington, D. C.
Telephone National 2345

\$500.00

Washington, D. C., October 19, 1938

Received of Dr. Louis Win Rapeer and Anne Pope Rapeer, husband & wife, tenants by Entirety, a deposit of Five Hundred and no/100—Dollars, to be applied as part payment in the purchase of Lot 65, Square 242 with improvements thereon known as No. 1304 Rhode Island Avenue, N. W., Washington, D. C., on the following terms, viz:

Price of property Ten Thousand Five Hundred and no/100 \$10,500.00)—Dollars

Terms Two Thousand and no/100—Dollars (\$2,000.00) cash at date of conveyance of which this deposit is a part.

Purchaser to assume a first deed of trust of \$7,000.00 due Nov. 24, 1939 with interest at 5 per cent per annum said interest payable monthly as below.

Balance of \$1500.00 to be paid in monthly installments of \$60.00, including interest at 6 per cent per annum, the unpaid balance of which shall be due and payable November 24, 1939. Above payments include interest on the above first trust and interest and curtailments on the second trust until maturity date of first trust.

Deferred payments on above described property to be secured by Deeds of Trust to trustees named by the party to be secured.

The title is to be good of record and in fact, or the deposit is to be returned, and sale declared off at the option of the purchaser, it being understood and agreed, however, that the property is being sold subject to such covenants as are of record. The seller and agent are hereby expressly re-

leased from all liability for damages by reason of any
8 defects in the title. In case legal steps are necessary to perfect the title, such action must be taken by the seller promptly at his own expense, whereupon the time herein specified for full settlement by the purchaser will thereby be extended for the period necessary for such prompt action.

Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, are to be adjusted to date of transfer.

Taxes are to be adjusted according to certificate of taxes as issued by the Assessor of the District of Columbia, except that any special assessments hereafter levied for work completed prior to the date of this contract shall be paid, or proper allowance made therefor, by the vendor at the date of transfer.

Examination of title, conveyancing, notary fees and all recording charges are to be at the cost of the purchaser; provided, however, that if upon examination the title should be found defective the seller hereby agrees to pay the cost of the examination of the title and also to pay the agent herein the regular rate of commission provided by the Washington Real Estate Board just as though the sale had actually been consummated and all the terms of this contract complied with.

Purchaser is required to make full settlement in accordance with above terms of sale within 45 (Forty five) days from date of acceptance by owner, or as soon thereafter as title report can be obtained; otherwise, at the option of the seller, the deposit may be forfeited as liquidated damages, or seller may maintain any legal or equitable remedy for the enforcement of specific performance or damages for failure to perform. In the event of the forfeiture of the deposit, the seller shall allow the agent one-half thereof as compensation for its services to him.

The risk of loss or damage to said property by fire or other casualty until the deed of conveyance is recorded is assumed by the seller.

9 The seller agrees to pay the stamp tax of fifty cents on each five hundred dollars (\$500.00) of equity in the property described herein, as required by the Federal Revenue Act of 1932.

Purchaser acknowledges he has examined the physical premises and is satisfied with the existing conditions thereof and is not relying on warranties or representations of the Owner or his Agent not contained herein.

The principals to this contract mutually agree that it shall be binding upon their respective heirs, executors, administrators or assigns.

This contract is made subject to the approval of the owner, and contains the final and entire agreement between the parties hereto, neither of whom shall be bound by any terms, statements, conditions or representations, oral or written, not contained herein. This contract is made in triplicate.

SHANNON & LUCHS CO., *Agent*

By

We, the undersigned, hereby ratify, accept, agree to and acknowledge the above contract of sale.

(s) ANNE POPE RAPEER Purchasers
 (s) LOUIS WIN RAPEER, 1607 Eye St., D. C.
 (s) HARRIETT STONE HICKLING Owner
 (s) D. PERCY HICKLING

Date OCT 21 1938

On the reverse side:

In connection with the contract set forth on the face hereof I hereby agree to pay $\frac{1}{2}$ to Shannon and Luchs Co. and Percy H. Russell Co. $\frac{1}{2}$ cash commission of \$415.00 for securing the purchaser. It is understood that should the deposit made by the purchaser be forfeited, one-half of the amount shall be paid Shannon and Luchs Co. and the Percy H. Russell Co. for their services.

(s) HARRIETT STONE HICKLING
 (s) D. PERCY HICKLING

10

Exhibit "B"

Washington, D. C.
 October 24, 1938

Shannon & Luchs Company
 1505 H Street, Northwest
 Washington, D. C.

Gentlemen:

In connection with the purchase of premises 1304 Rhode Island Avenue, Northwest, under contract dated October 19, 1938, we, the undersigned, hereby notify you that we do not want the title to this property searched or a Title Certificate issued, and we hereby release you from any and all liability in event there is any defect in the title.

We further authorize you to have the property deeded to Anne Pope Rapeer, individually and in her own right, and agree that settlement shall be made within forty-five days from the date of the contract.

Very truly yours,

(s) Louis Win Rapeer

(s) Anne Pope Rapeer

11

Answer to Counterclaim

Filed June 22 1939

*

*

*

First Defense

The defendant fails to state a claim against plaintiff upon which relief can be granted.

Second Defense

If there ever was a binding agreement between the plaintiff and defendant to hold the property set forth in the counterclaim for the beneficial interest of both of them, the defendant wholly failed to sustain his interest therein, abandoned the endeavor and failed to comply with the agreement under which he claims.

Third Defense

Plaintiff admits that she signed a contract for the purchase of property set forth in the counterclaim, but states that this contract to purchase property, as set forth in the counterclaim, is not an agreement to purchase as tenants by the entireties, and the letter requiring the deed to be made in the sole name of the plaintiff, which defendant makes part of his counterclaim, definitely determines that issue, and that thereupon plaintiff took the legal and beneficial title to the property which is made the subject of defendant's counterclaim.

Fourth Defense

As between husband and wife, such a transaction as set forth in the counterclaim is a gift or advancement to the wife.

Fifth Defense

The defendant, under oath, has stated that in handling the property set forth in the counterclaim he has attempted to defraud his first wife to defeat any claim which she might have for alimony.

Sixth Defense

The plaintiff admits that she investigated the purchase of the properties with the defendant; admits that she signed the contract for the purchase of a certain piece of property, but denies that she signed such contract as would place the property in the joint names of the plaintiff and defendant as tenants by the entireties and specifically denies that the defendant paid \$1,500 into this project, and denies that there is any agreement to hold as trustee; she admits that there was a discussion with respect to wills, but denies that such discussion ever culminated in any definite agreement; she admits that a letter was written to the real estate agency which was handling the negotiations for the sale of 1304 Rhode Island Avenue, and that such letter instructed them, as was proper, to make the deed in the sole name of the plaintiff, and states further that she would not have accepted nor paid her money into the purchase of this property unless she could own the property in her sole name and in her sole right. She admits that the defendant at times quartered some of his assistants on her property, and she denies that the defendant put \$1,500 in cash of his own money into the property.

Each and every other averment not herein specifically admitted, she denies.

Seventh Defense

The defendant in his counterclaim has failed to set up a cause of action against the plaintiff.

WHEREFORE, the plaintiff prays:

1. Judgment declaring the title to 1304 Rhode Island Avenue to be hers alone in fee simple title.
2. Judgment declaring that the personal property contained therein belongs to the plaintiff absolutely.

3. That the counterclaim of defendant be dismissed with costs against him and counsel fees in favor of plaintiff.

JERRY A. MATHEWS

H J D

HARRY J. DALY

Attorneys for plaintiff

14 *Defendant's Reply to Plaintiff's Answer to Counter-Claim, in Which Plaintiff Seeks Relief Not Asked for in the Complaint*

Filed June 28 1939

* * *

1. The defendant denies all the allegations of the first defense.

2. The defendant denies all the allegations of the second defense.

3. The defendant denies all the allegations of the third defense.

4. The defendant denies all the allegations of the fourth defense.

5. The defendant denies all the allegations of the fifth defense.

6. The defendant denies all the allegations of the sixth defense.

7. The defendant denies all the allegations of the seventh defense.

HUDSON, CREYKE & HUDSON

By RAYMOND M. HUDSON

Attorneys for Defendant

15 *Pretrial Proceedings*

Filed October 11 1940

* * *

Statement of Nature of Case:

Suit for divorce and property settlement. At pretrial, counsel for plaintiff states that plaintiff has been awarded a valid decree of divorce in the State of Florida. Upon this information, motion was made to dismiss the suit for divorce, and the case will go to trial on the counter-claim for property settlement.

STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

That the count herein for divorce be dismissed and the suit go to trial on the counter-claim only.

Contract between the parties, initialed by the Court at pretrial, may be received in evidence without formal proof, subject to right to object on grounds of relevancy and materiality.

It is stipulated that copy of letter dated October 24, 1938, to Shannon & Luchs Co., is a true copy of original, and may be received in evidence without formal proof. Said copy is initialed by the Court at pretrial.

Counsel for defendant at pretrial concurs that the divorce granted to plaintiff in Florida is a valid decree, and that the Florida action did not make provisions for any property settlement, but reserved such settlement; and it stipulated between the parties at pretrial that property rights were not disposed of by the Florida decree.

Deed, transferring property to plaintiff, may be received in evidence without formal proof.

Dated October 11, 1940

O. R. LUHRING
Pretrial Justice

J. A. MATHEWS
HARRY J. DALY
for Plaintiff

RAYMOND M. HUDSON
for defendant

16 *Motion for Judgment for the Plaintiff on
Defendant's Counter Claim*

Filed November 18 1940

* * *

Comes now the plaintiff by her attorneys and moves the Court to dismiss the counter claim filed on behalf of the defendant and for reason therefore states:

1. That at the time of filing the counter claim aforesaid the parties hereto were husband and wife and the said counter claim sought to adjust property interests in this action which was originally for divorce; that by consent the action for divorce has been dismissed and that the parties hereto are no longer husband and wife as will appear from certified copy of divorce decree hereto attached.

2. The Court has no jurisdiction to hear the defendant's counter claim.

3. For such other and further reasons as may be advanced at the hearing hereof.

Respectively Submitted,

HARRY J. DALY

Attorney for the Plaintiff

17 *Order Dismissing Complaint and Counterclaim*

Filed November 20 1940

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*

Upon consideration of the Motion of the Plaintiff filed on the 18th day of November, 1940 to dismiss the complaint and counterclaim filed herein, and it appearing that the original complaint prayed for a limited divorce only and that the plaintiff since the filing of her complaint herein sought and obtained a decree for absolute divorce from the defendant in the State of Florida in which cause the defendant appeared generally, it is by the Court this 19th day of November, 1940,

Ordered, That the complaint and counterclaim be and they thereby are dismissed and the injunction pendente lite against the defendant be and it hereby is dissolved.

DANIEL W. O'DONOGHUE

Justice

Consent:

HARRY J. DALY

No objection to form

RAYMOND M. HUDSON

Atty for Deft

Notice of Appeal

Filed December 10 1940

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Notice is hereby given this 10th day of December, 1940 that the defendant, Louis W. Rapeer, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of November, 1940, dismissing his counterclaim in favor of the plaintiff and against this defendant.

LOUIS W. RAPEER

HUDSON, CREYKE & HUDSON

By Raymond M. Hudson

Attorneys for Defendant

Memorandum

December 10 - 1940

Bond for costs on appeal \$250.00—filed.

*Defendant's Statement of Points to be
Relied Upon on Appeal*

Filed January 13 1941

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*

Point 1. When a husband and wife buy property on contract as tenants by the entirety both paying part of the purchase price then by agreement title by convenience is taken in name of wife and later the wife sues for legal separation and husband files answer and counterclaim to have an estate of tenants by the entirety declared and established, defendant is entitled to have a trial on the merits of the counterclaim notwithstanding the plaintiff in the meantime had secured an absolute divorce in Florida, where no property rights were settled, especially as after the Florida divorce. Plaintiff at the Pretrial set up such divorce and moved a dismissal of her legal separation suit, which Pretrial Justice Luhring permitted, on plaintiff's stipulation in the record that the court shall then try the defendant's counterclaim and settle all property rights as

none were settled in the Florida court, and at such time defendant stated to Justice Luhring in open court that if at the trial it developed defendant was not entitled to have an estate of tenants by entirety established that then defendant in the alternative would ask to have a trust lien declared and granted against the property for such sums as defendant had put in the house and furnishings, and the same statement was made orally to Justice O'Donoghue and in defendant's brief filed with him.

20 Point 2. Under the foregoing facts and situation the court had jurisdiction not only of the subject matter, but of the parties and it could not on its own motion dismiss the counterclaim.

Point 3. Under the foregoing facts and situation the plaintiff is estopped by her Pretrial stipulations to move a dismissal of the counterclaim.

Point 4. The District Court cannot of its own motion dismiss any case or counterclaim unless the court is without jurisdiction of the subject matter.

Point 5. District of Columbia Code Title 14, Section 69 (a) is not applicable, but had it ever been applicable to such a situation it was repealed by the Civil Procedure Rules and the act promulgating the Rules.

Point 6. The court erred in granting the plaintiff's motion to dismiss the counterclaim and in dismissing same.

Point 7. The court erred in refusing to permit the counterclaim going to trial on the merits.

HUDSON, CREYKE & HUDSON
RAYMOND M. HUDSON
Attorneys for Defendant

21 *Designation of Record*

Filed January 13 1941

* * *

The clerk will copy the following documents only in the transcript on appeal.

1. That part of defendants answer only which constitutes "second defense and counterclaim" and exhibits A and B thereto but no other part of the answer.

2. The plaintiff's answer to the defendant's counterclaim.

3. The defendant's reply to the plaintiff's answer to the counterclaim.

4. The Pretrial proceedings and stipulation therein and Justice Luhring's certificate thereto.
5. Motion for judgment for the plaintiff on defendants counterclaim.
6. Final order of November 19, 1940.
7. Defendant's notice of appeal.
8. Memo of bonds.
9. Defendants statement of points to be relied upon on the appeal.
10. This designation and stipulation.

HUDSON, CREYKE & HUDSON
RAYMOND M. HUDSON
Attorneys for Defendant

Copy received.

HARRY J. DALY
Attorney for Plaintiff

22 *Designation by Appellee of Additional Matter
 to be Included in Record on Appeal*

Filed January 15 1941

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*

Appellee designates the following additional matter to be contained in the record on appeal.

1. Such parts as the original bill of complaint as are pertinent to this appeal which are paragraphs five (5) and six (6) of the complaint for limited divorce together with prayer numbered two (2) and the verification signed by Gladys P. Rapeer, the plaintiff in said complaint.

JERRY A. MATHEWS
HARRY J DALY
Attorneys for Appellee

Copy of the foregoing mailed the 14th day of January, 1941 to Raymond Hudson, Esq., Attorney for the Appellant, 1343 H Street, N. W. Washington, D. C.

HARRY J. DALY

23

District Court of the United States
For the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 22, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, and in accordance with Rule 75 (g) of the Rules of Civil Procedure for the District Courts of the United States, in Civil Action No. 2829, wherein Gladys P. Rapeer is plaintiff and Louis W. Rapeer is defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of January, 1941.

CHARLES E STEWART,
Clerk.

By CHAS B COFLIN
Asst Clerk

Endorsed on Cover: No. 7813. Louis W. Rapeer, Appellant, vs. Gladys P. Rapeer. United States Court of Appeals for the District of Columbia Filed Jan 18 1941 Joseph W. Stewart, Clerk.

BRIEF OF APPELLANT

IN THE United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

October Term, 1941

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 7813

FILED JUN 25 1941

Joseph W. Stewart

LOUIS W. RAPEER, Appellant

CLERK

VS.

GLADYS P. RAPEER, Appellee

Appeal from the District Court of the United States
for the District of Columbia

RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
1343 H. St., N. W.
Washington, D. C.

Attorneys for Appellant

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

October Term, 1941

No. 7813

LOUIS W. RAPEER, Appellant

vs.

GLADYS P. RAPEER, Appellee

APPELLANT'S BRIEF.

Jurisdictional Statement.

Appellee filed a complaint (R 1) in the District Court seeking a legal separation, to which the Appellant filed an answer and a counterclaim (R 3), seeking to have an order declaring on the record that the Appellant and Appellee are owners as tenants by the entirety of certain real estate and personal property, and that Appellant is entitled to all the rents and profits from the real estate. It alleged that the Appellee and Appellant bought the property on a

written contract (R 6) which stated that they were buying as tenants by the entirety. It is alleged that they later had the deed put in the name of the Appellee only (R 9); and she was to hold as a trustee for the benefit of the Appellant and Appellee (R top 4) as tenants by the entirety and alleging how much the Appellant paid into the transaction (R 4).

The Appellee answered the counterclaim (R 9) and sought affirmative relief by praying (R 10) that she be declared the owner absolutely and in fee simple of the real and personal property, and alleging what money she paid into the transaction.

Appellant filed a reply (R 11) to this affirmative answer of Appellee denying all the allegations thereof.

When the action came up for pre-trial, the Appellee stated that she had in the meantime obtained an absolute divorce from the Appellant in Florida and moved to dismiss her action, and the case to go to trial on the counterclaim, which motion was granted.

The Appellee stipulated at the pre-trial (R 12) that the property rights of the parties were not disposed of by the Florida decree, and that "the Florida action did not make any provisions for any property settlement but reserved such settlement," and further stipulated that the counterclaim go to trial on its merits in the lower court.

When the action came to trial on its merits while the pre-trial proceedings were being examined, the *Court on its own motion* stated that it would dismiss the entire action as the Court was without jurisdiction to try the counterclaim be-

cause of Title 14, Sec. 69 (a) of the District Code unless the Appellant, by the following Friday, produced authority that the court had jurisdiction.

The Appellant filed a brief on Friday, and thereupon the following Monday the Appellee filed a motion to dismiss because of lack of jurisdiction (R 12), which came up on the 19th; and the order appealed from was entered (R 13), dismissing the counterclaim for lack of jurisdiction.

The lower court had jurisdiction under District Code 1901, Sec. 61 (1929 Title 18, Sec. 41, 43, and 44; 45 Stats 1056, c. 41; 36 Stats 1167, c. 231, Sec. 289; 31 Stats, 1200, 1202, c. 858, Secs. 60, 61, 64). The Act of June 25, 1936 (49 Stat. 1921, c. 804), changed the name of the supreme court to "District Court of the United States for the District of Columbia," and provided "Nothing in this Act shall affect the jurisdiction or functions of the court."

The pertinent parts of Title 18, Secs. 41, 43 and 44 are as follows:

41—"The supreme court of the District shall have general jurisdiction in law and equity."

43—"The said court shall possess the same powers and exercise the same jurisdiction as the district courts of the United States."

44—"Said court, except as otherwise provided in this title, shall have cognizance * * * of all cases in law and equity between parties."

This court has jurisdiction under District Code 1901, Sec. 226 (1929 Title 18, Sec. 26; 41 Stats. 1312, c. 125, Sec. 12).

Statement of Case.

The foregoing jurisdictional statement practically states the whole case involved in this appeal, as the sole question decided was the one of jurisdiction of the lower court.

At the pre-trial and again on the hearing on the merits (see R 15) the Court was told that if it developed that the Appellant was not entitled to have an estate of tenants by the entirety established, that then the Appellant in the alternative would ask to have a trust lien declared and granted against the property for the money he had put into it.

There is alleged (k 4) a partly executed post-nuptial agreement whereby the Appellee was to hold title to the property as trustee for the benefit of the Appellant and Appellee as tenants by the entirety and that the Appellee was not to encumber or convey the premises or contents without the written consent of the Appellant, and each was to make a will in favor of the other, all of which the Appellant complied with. The failure of the Appellee to do likewise is what lead to the suit for separation.

Statutes and Regulations Involved.

The main statute involved in this appeal is District Code 1929, Title 14, Sec. 69 (a), Code 1901, Sec. 974 (a). Act of August 7, 1935, 49 Stat. 540, c. 453, Sec. 3.

Also involved is District Code 1929, Title 18, Sec. 41, 43, 44; 45 Stats, 1056, c. 41; 36 Stats 1167, c. 231, Sec. 289; 31 Stats, 1200, 1202, c. 258; Sec. 60, 61, 64.

Also involved is part of USCA Title 28, Sec. 723 (b). Act of June 19, 1934, 48 Stats. 1064, c. 651, Sec. 1, putting into effect Civil Procedure Rules.

There are also involved Federal Rules of Civil Procedure 1, 13 (a) (b) and (i), 42 (b) and 54 (b).

Defendant's statement of points to be relied upon on appeal.

Point 1. When a husband and wife buy property on contract as tenants by the entirety, both paying part of the purchase price, then by agreement title by convenience is taken in name of wife, and later the wife sues for legal separation and husband files answer and counterclaim to have an estate of tenants by the entirety declared and established, defendant is entitled to have a trial on the merits of the counterclaim notwithstanding that the plaintiff in the meantime had secured an absolute divorce in Florida, where no property rights were settled, especially as after the Florida divorce, plaintiff at the Pre-trial set up such divorce and moved a dismissal of her legal separation suit, which Pre-trial Justice Luhring permitted, on plaintiff's stipulation in the record that the court shall then try the defendant's counterclaim and settle all property rights, as none were settled in the Florida court, and at such time defendant stated to Justice Luhring in the open court that if at the trial it developed defendant was not entitled to have an estate of tenants by entirety established, that then defendant in the alternative would ask to

have a trust lien declared and granted against the property for such sums as defendant had put in the house and furnishings; and the same statement was made orally to Justice O'Donoghue and in defendant's brief filed with him.

Point 2. Under the foregoing facts and situation the court had jurisdiction not only of the subject matter, but of the parties, and it could not on its own motion dismiss the counterclaim.

Point 3. Under the foregoing facts and situation the plaintiff is estopped by her Pre-trial stipulations to move a dismissal of the counterclaim.

Point 4. The District Court cannot of its own motion dismiss any case or counterclaim unless the court is without jurisdiction of the subject matter.

Point 5. District of Columbia Code Title 14, Section 69 (a) is not applicable; but had it ever been applicable to such a situation it was repealed by the Civil Procedure Rules and the act promulgating the Rules.

Point 6. The court erred in granting the plaintiff's motion to dismiss the counterclaim and in dismissing same.

Point 7. The court erred in refusing to permit the counterclaim going to trial on the merits.

Each and every one of the foregoing points is relied upon on this appeal, whether or not it is further argued in this brief.

SUMMARY OF ARGUMENT.

POINT I.

Title 14, Sec. 69 (a) simply made statutory and permanent a rule of property theretofore established by this Court and it in nowise increased, diminished or restricted the jurisdiction of the lower Court, and if it could have by any chance been construed to prevent the granting of the relief sought in the counterclaim in this action, it was certainly to that extent repealed by USCA Title 28, Sec. 723 (b) and the Civil Procedure Rules promulgated thereunder.

As the lower court on its own motion announced it would dismiss the counterclaim because of sub-section 974 (a) of the Code of 1901, Title 14, Sec. 69 (a), Code of 1929, unless counsel presented authorities to the contrary, we will first discuss this new section. The court will note that the act itself made it a sub-section to Code 974, and it will also note that it was not a sub-section to 976 where it would be if it was to prevent a settlement of property rights in a divorce case, which will be seen in a discussion of Jackson v. Jackson, below.

The section as stated in the act is as follows:

“974a. Upon the entry of a final decree of annulment or divorce *a vinculo*, in the absence of a valid antenuptial or *postnuptial agreement* in relation thereto, all property rights of the parties in joint tenancy by the entirety shall stand dissolved and the court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just and reasonable.” (August 7, 1935, 49 Stats. 540, c. 453 sec. 3.)

The statute is conditioned on the absence of an ante- or post-nuptial agreement, and appellant alleges in the counterclaim a verbal post-nuptial agreement which was partly complied with.

Counsel are informed by George C. Gertman, Esq., who was chairman of the Bar Association committee urging the enactment of this section, that the purpose of the section was to make statutory the rule of property theretofore established by this court in *Moore v. Moore*, below.

That the purpose of the section was to make a statutory rule of property, and not to increase or add to the jurisdiction or power of the District Court, is clearly established by the cases.

In *Jackson v. Jackson*, 1 MacArthur (8 D. C.) 34 the court held as stated in the syllabus:

"I. Where real estate has been purchased by the joint earnings of husband and wife, and the title taken in the name of the wife alone, an equity by way of trust may be deduced for the benefit of the husband.

"II. In a petition for divorce by the wife in which no alimony is asked, and a cross-bill by the husband charging adultery upon the wife, and that the property was acquired since the marriage by their joint earnings, the divorce was granted upon her petition. Still it was held that under the 9th section of the statute regulating divorces, the court has power to set off to the wife such part of the property as may be reasonable, in view of the resources and circumstances of the husband."

The court said, page 36:

"The 9th section of the statute regulating divorces in this District is as follows:

'In all cases where a divorce is granted, the court allowing the same shall have power, if it see fit, to

award alimony to the wife, and to retain her right of dower, and to award to the wife such property, or the value thereof, as she had when she was married, or such part or the value thereof as the court may deem reasonable, having a regard to the circumstances of the husband at the time of the divorce'."

Thus the court held that it had jurisdiction to try the merits of this case.

On Appeal in 91 U. S., 122, 23 L. Ed. 258, the Supreme Court reversed the case on the merits and not on the power or jurisdiction of the court.

In the Compiled Statutes of the District of Columbia, page 277 this case is cited to Sec. 41 which is as follows:

"In all cases where a divorce is granted, the Court hearing the same shall have power, if it see fit, to award alimony to the wife, and to retain her right of dower."

This section 41 was carried into the Code of 1901, Sec. 976 Code of 29, Title 14, Sec. 71.

In O'Neil v. O'Neil, 55 Apps. D. C. 40 at 42; 299 Fed. 914, where the court refused an absolute divorce and granted a legal separation, which was alleged but not prayed, it tried on the merits the rights of the wife to certain moneys which she contended were a trust fund for her, and the court said:

"There was no agreement between the parties sufficient in terms for the creation of an express trust in favor of the wife in respect to these deposits, and none would be implied from the circumstances. The same conclusion follows respecting the other assets of the defendant. The trial court therefore rightly overruled the plaintiff's prayer for an accounting for these deposits and other assets."

* * *

“We think that under the circumstances the trial court should have granted a limited divorce in favor of the plaintiff. It is true that the bill contained no specific prayer for such a degree; nevertheless it contained a charge of desertion and prayed among other things for general relief. Section 968, D. C. Code; *Carey v. Carey*, 8 App. D. C. 528; *Hitchcock v. Hitchcock*, 15 App. D. C. 81; *Snow v. Snow*, 48 App. D. C. 448; *Davis v. Davis*, 48 App. D. C. 362; *Underwood v. Underwood*, 50 App. D. C. 323, 324, 271 Fed. 553.

“We therefore reverse the decree of the lower court in so far only as it refused to grant a divorce from bed and board to the plaintiff.”

In *Moore v. Moore*, 51 App. D. C. 304 at 305; 278 Fed. 1017, the court held that where the wife was divorced for adultery the husband was entitled in a later suit to the dissolution of the estate of joint tenants bought with his money, and the court stated:

“In January of 1920 the husband *filed a petition for divorce in Maryland* on the ground of adultery, and in July of the same year the court, after trial, found the wife guilty of adultery as charged in the bill and *granted a divorce*. On May 25, 1920, the petition herein was filed and on October 15th following a supplemental petition was filed, setting up the divorce decree.”

It seems that the divorce for adultery in Maryland did not prevent the District Court from settling the property rights. This case was followed in *Osborn v. Osborn*, 59 App. D. C. 280; 40 F (2d) 800, where the divorce suit and decree was in the District Court and later the suit to set aside the joint tenancy was also in the District Court. There is nothing in the opinion to the effect that the Court could not have dissolved the joint tenancy and settled the property rights in the divorce case.

The general rule is that the dissolution of Joint estates and settlement of property rights may be in the divorce

suit, (13 R. C. L. 1122 and cases in Notes 13 and 14) as the divorce converts the tenancy by the entirety into a Joint tenancy or tenancy in common.

The Civil Procedure Rules clearly entitled appellant to a trial of his counterclaim in this present action.

In *Jones v. St. Paul Fire Ins. Co.*, 108 F (2d) 123 at 125, (CCA-5) the court held and said:

“The new rules seek to require in a civil action what has always been aimed at in an equity suit, that all claims growing out of a single transaction be brought in and settled in the one case Rule 13, 15(c), 18(a). That one of them alone may involve less than \$3,000 is not an obstacle if the controversy as a whole involves that much; and *jurisdiction once acquired lasts till the court finishes with all parts of the controversy.*”

The act (USCA Title 28, section 723(b)) putting into effect the Rules of Civil Procedure provides that when the rules become effective “thereafter all laws in conflict therewith shall be of no further force or effect.”

Rule 1 provides that “they shall be construed to secure the just, speedy and inexpensive determination of every action.”

Rule 13(a) provides for a compulsory counterclaim, but this counterclaim is not a compulsory one.

Rule 13(b) provides for a permissive counterclaim, which is the counterclaim set up in this suit.

Rule 13(i) provides:

“If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so

to do, even if the claims of the opposing party have been dismissed or otherwise disposed of."

Rule 42(b) referred to therein provides:

"The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Rule 54(b) provides for different judgments at various stages of the proceedings on different counterclaims and the important part of the rule is italicized. The rule is:

"When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. *The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims.* In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment of judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

In 1 Moore's Federal Practice, page 699, discussing Rule 13, it is stated:

"Since a permissive counterclaim is tantamount to an independent action, separately cognizable from the opposing party's claim, it is not affected by the latter's abandonment of his action, nor by a decree dismissing that action on the merits or otherwise, if there is federal jurisdiction to support the permissive counterclaim, as ordinarily there will be.

"Unlike compulsory counterclaims, upon which separate judgments cannot be entered, a judgment may be entered on a permissive counterclaim before, after, or at the same time judgment is entered upon the

original claim. This is permitted by Rule 54(b) because the permissive counterclaim is, as frequently pointed out, *essentially an independent action*. But, 'In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.' This in no way affects the right to appeal. The judgment on the permissive counterclaim becomes appealable when entered, and the time for appeal therefrom begins to run from the entry of such judgment."

Again at page 732 Moore states:

"Subdivision (i) makes it clear that the dismissal of a claim or other disposal does not preclude the court from proceeding to judgment on a counterclaim or cross-claim, subject, of course, to the principle that it has jurisdiction to so do."

Alexander v. Hillman, 296 U. S. 239 at 242 and 243; 80 L. Ed. 192 at 201 and 202 states that under Equity Rule 30 former decisions on recoupment and set-off are changed and holds that receivers should not be sent to another court on part of their counterclaims. The Court said: "That would introduce additional elements of uncertainty that would involve unnecessary delay, work and expense." Civil Procedure Rule 1, as quoted above, forbids such unnecessary delay and expense.

In General Electric Co. v. Marvel Metals Co., 287 U. S. 430, 434, 435; 77 L. ed. 408, 412, 413, the Court held that the counterclaim there was permissive like the one in the case at bar and that a suit on a counterclaim could not have been brought in the court where the counterclaim was filed, as it was prevented by the statute, and the Court said: "Section 48 relates to venue. It confers upon defendants in

patent cases a privilege in respect to the places in which suits may be maintained against them. And that privilege may be waived."

It is stated in 1 Moore 686:

"But when the plaintiff has obtained access to the federal courts on some federal grounds defendant's counterclaim may not present such a federal ground. Thus in *Moore v. New York Cotton Exchange*, 270 U. S. 953, 46 S. Ct. 367, 70 L. Ed. 750, jurisdiction of the plaintiff's claim was based on the fact that it was predicated on the Sherman Anti-Trust Act. Defendant's counterclaim, however, had no such basis and could not have been brought as an independent action in the federal courts. Nevertheless, the Supreme Court held that jurisdiction over the plaintiff's claim afforded sufficient basis to adjudicate defendant's compulsory counterclaim. The compulsory counterclaim is essentially auxiliary or ancillary to the main controversy; and the fact that the plaintiff's claim is denied on the merits, as it was in the *Moore* case, does not prevent the court from deciding defendant's counterclaim on the merits. The court may retain and decide such a counterclaim although the opposing party does not proceed to hearing on his bill. *Howard v. Leete*, (C. C. A. 6th, 1919) 257 Fed. 918."

In *Kirby v. American Soda Fountain Company*, 194 U. S. 141; 48 L. Ed. 911, the plaintiff filed a bill to cancel a sales agreement for fraud, and the defendant filed a counterclaim for judgment for the purchase price of the goods. Later the plaintiff dismissed its bill before trial, and the Supreme Court held that the plaintiff could not thus divest the Court of its jurisdiction by his voluntary dismissal of the suit and that the counterclaim should be tried.

The parties hereto having, by agreement, withheld from the Florida court the decision of property rights and having further agreed that the lower Court should determine

same in this suit, then, under the above decisions, the lower Court clearly has jurisdiction, and the parties are bound by their stipulation.

If D. C. Code Title 14, section 69(a) could be construed to require the question of tenants by the entirety to be decided in an absolute divorce suit, then that section, to that extent, was repealed or nullified by the act promulgating the rules and by the rules thereunder. The Court must remember that the present suit was not one for an absolute divorce, and the Code section does not in words apply to a suit for legal separation.

POINT II.

(a) The lower Court had jurisdiction of the res—the subject matter—as well as of all the parties who stipulated for trial on the merits in this action.

(b) The lower Court could not of its own motion dismiss the counterclaim.

(c) The appellee is estopped by her Pre-trial stipulations, other agreements and actions, to move dismissal of counterclaim.

(d) The Florida Court did not have jurisdiction of, or any power over, the res—the subject matter—and the Florida law does not require settlement of property rights between husband and wife in the divorce suit and appellee stipulated property rights were not disposed of by the Florida decree and the suit “reserved such settlement”—property settlement.

There can be no question that the lower Court had jurisdiction of the counterclaim under Code Title 18 and the

portions of Sec. 41, 43 and 44 quoted above as the real estate involved was all in the District. It does not seem necessary to cite further authority.

The Court cannot, on its own motion, dismiss any case unless there is a lack of jurisdiction of the subject matter.

It is not contended by anyone that the Court is without jurisdiction of a suit to establish a tenancy by the entirety by a husband or wife against the other where the other one holds the title. The present suit was not for a divorce *a vinculo* but simply for a legal separation.

In *Fletcher vs. McMahon*, 119 F (2d); Appeals, D. C. . . .; 69 WLR, 514, this Court quoted from the Supreme Court as follows:

“Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicted upon the existence of jurisdiction, not upon the absence of it.” *Binderup v. Pathe Exchange*, 263 U. S. 291, 305. See also *Nat. Ben. Life Ins. Co. v. Shaw-Walker Co.*, 71 App. D. C. 276, 284, 111 F. (2d) 497, 505, 68 Wash. Law Rep. 426.

The appellee is estopped to move for the dismissal of the appellant's counterclaim, because at the pre-trial hearing the appellee and appellant entered into a written agreement, which was confirmed by an order of the Court, that “the Florida action did not make any provision for any

property settlement, but reserved such settlement", and "That the count herein for divorce be dismissed and the suit to go to trial on the counterclaim only." This estops the appellee from moving for a dismissal of the counterclaim and requiring a new suit.

This was a deliberate and clear election of remedies by the appellee, which is binding. If a new suit were necessary, which we deny, the above agreement at pre-trial would be equivalent to a new suit and the entrance of an appearance by Mrs. Rapeer as a defendant therein.

Appellant believes that under the former law and rules, he was entitled to a trial on the merits of the counterclaim, but he is relying on the new rules of civil procedure and under them it is very clear that the lower Court has jurisdiction of the subject matter of this counterclaim. The Court cannot of its own motion dismiss same and force a new suit with its attendant delay and expense and possibly a question of *res adjudicata* being raised.

Appellant contends that he is entitled to the trial, and it should go forward at once.

As stated at the pre-trial and in the lower Court, appellant is contending that he has a tenancy by the entirety and that the Court should so declare same of record or, if the Court rules that it cannot be declared of record, then, in the alternative, that there be a trust declared for the appellant for his share of the property and that the appellant will, as stated before, amend the pleadings if necessary to meet the rulings of the Court and such evidence as may be presented.

The Florida Courts certainly could not enforce the D. C. Code, Title 14, section 69(a) above. The Florida Courts have no power to pass titles in the District of Columbia. A deed of a Commissioner appointed by a Florida Court to convey the property in the District would not be recognized by the Courts of the District of Columbia and would not be valid to pass title and the same could not be enforced.

Collins v. McDonald, 68 App. D. C. 386, 98 F (2d) 258 held that receivers of the Federal Court in Florida could not sue in this District. If they are not recognized their deeds will not be recognized.

The Florida Courts have held that they have jurisdiction in a divorce case to vacate a tenancy by the entirety; and it may be asserted, though it need not necessarily be asserted, as the statute gives the divorce jurisdiction, and the court has general equity jurisdiction very much the same as the District of Columbia. Francis v. Francis, 133 Fla. 495, 182 So. 833. Meloche v. Meloche, 101 Fla. 660, 133 So. 339; 140 So. 319. Hill v. Hill, 123 Fla. 571, 167 So. 414.

Conclusion.

The lower court having decided only the question of jurisdiction, and that erroneously, as the lower court clearly had jurisdiction of the counterclaim, counsel feel confident that this Court will reverse the judgment and remand the action, with instructions to the lower court to try the appellant's counterclaim on its merits.

RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Attorneys for Appellant.

June 25, 1941.

BRIEF OF APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 7813

FILED OCT 1 - 1941

LOUIS W. RAPEER, *Appellant*

v.

GLADYS P. RAPEER, *Appellee*

Appeal from the District Court of the United States for the
District of Columbia.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7813

LOUIS W. RAPEER, *Appellant*

v.

GLADYS P. RAPEER, *Appellee*

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF OF APPELLEE.

COUNTER STATEMENT.

With the following corrections and additions, appellee admits the statement, entitled "Jurisdictional Statement" in appellant's brief. There was no agreement, express or implied at the time title was taken by appellee that she was to hold as a trustee for the benefit of the two as tenants by the entirety (R. 9 and 10). Appellee, answering counter

claims set up amounts paid by herself and her father and denied that appellant paid \$1500 as down payment on the purchase (R. 10).

At pre-trial, counsel for appellant and appellee concurred in a statement that appellee, (without the knowledge or approval of her counsel in the cause pending in the United States District Court), had repaired to Florida and with the knowledge and participation in the case of defendant's counsel, had obtained an absolute divorce.

After commenting upon the Florida decree the court at pre-trial suggested that the issue upon the complaint for divorce in the District of Columbia had been taken out of the case and asked counsel if they were prepared to agree and stipulate that the Florida decree was valid. Assent being given by attorneys on each side the court then expressed the opinion informally that he doubted there was any jurisdiction to proceed with the cross complaint.

Counsel for appellee did not ask that the case go to trial upon the counter claim nor for a dismissal of the appellee's complaint for a limited divorce then pending in the District Court until the judge at pre-trial, having accepted the statement of counsel on both sides that the Florida decree was valid, suggested dismissing the action, as the next necessary step in the proceeding at pre-trial.

When the action came to trial on its merits, the court examining the record of pre-trial, took the same attitude expressed by the judge at pre-trial, that there was no jurisdiction to proceed further on the counter claim, resting his conclusion upon Title 14, Sec. 69 (a) (*infra*) of the Code of Laws of the District of Columbia.

The court below was without jurisdiction to settle property rights between the parties because the complaint filed by appellee (plaintiff below) asked for a divorce *a mensa et thoro* and not for a divorce *a vinculo*. The jurisdiction is defined and limited by the statute District Code, 1929, Title 14, Sec. 69 (a), Code 1901, Sec. 974 (a). Act of August 7, 1935, 49 Statute 540 c. 453, Sec. 3.

SUMMARY OF ARGUMENT.

At common law action between husband and wife to establish title in the husband, there being no charge of misconduct made against the wife, was not known. By statute the equitable distribution of joint property upon the final decree in an absolute divorce gave the United States District Court for the District of Columbia a limited jurisdiction over the property rights of persons for whom the bonds of matrimony were being dissolved.

The instant case is outside the jurisdiction of the court for it is not within the purview of the Code of Law for the District of Columbia. No suit was ever filed here for absolute divorce and no decree for divorce may be found in this cause in this jurisdiction, and the property rights are not joint between the parties.

If the Court has no jurisdiction to hear this matter by Statute, the Rules of Civil Procedure cannot assist appellant for by their terms the Rules of Civil Procedure neither extend nor limit the jurisdiction of the district courts.

Even if the court had jurisdiction to hear this cause, there is no indication that the terms of the alleged trust were reduced to writing and consequently must fall within the confines of the Statute of Frauds.

ARGUMENT.

The section of the statute which determines the issue of jurisdiction is as follows:

“974a. Upon the entry of a final decree of annulment or divorce a vinculo, in the absence of a valid antenuptial or postnuptial agreement in relation thereto, all property rights of the parties in joint tenancy or by the entirety shall stand dissolved and the court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just and reasonable”. (August 7, 1935, 49 Stats. 540, c. 453 sec. 3).

The language is not ambiguous and plainly limits the jurisdiction to an action for annulment or absolute divorce. The opinions of members of the district bar, however distinguished they may be are not to be considered in the interpretation of a statute. Even where there is ambiguity and the court looks to Congressional debates to determine the intent of Congress, which is rarely done, the courts have never gone outside the legislative body to take into account suggestions of bar committees or lawyers to determine the legislative intent.

In *Helvering v. City Bank Farmers Trust Company*, 296 U. S. 85, 80 L. Ed. 62, 56 S. Ct. 70. Mr. Justice Roberts speaking for the Court said:

“We are not at liberty to construe language so plain as to need no construction”, (citing *Hamilton v. Rathbone*, 175 U. S. 414, 419, 44 Law Ed. 219-21, 20 S. Ct. 155; *Thompson vs. U. S.*, 246 U. S. 647, 551, 62 Law Ed. 876, 879, 38 Sup. Ct. 349), “or to refer to Committee reports where there can be no doubt of the meaning of the words used” citing *Wilbur v. U. S.*, 284 U. S. 231, 237, 76 Law Ed. 261, 264, 52 Sup. Court 113.

The citation in appellant's brief of the statute (compiled statutes of the District of Columbia, page 277 Sec. 41) disproves the very point for which appellant contends, for it reads: “In all cases *where a divorce is granted*, the court shall have power if it see fit” etc. and even this is restricted to “alimony” and “dower”. As under the statute upon which the lower court decided the case, the power was discretionary with the court in the exercise of equity powers and was incident to the entering of a final decree, which stage was never reached in the instant case.

The complaint filed in the court below by appellee (plaintiff below) was for a divorce *a mensa et thoro*. At no time while the cause was pending did jurisdiction attach to settle property rights under the authority of Title 14, Sec. 69 (a) (*supra*) relied upon by the court below to dismiss the case for want of jurisdiction. Had the case proceeded to a de-

cree and the appellee (complainant below) prevailed, the court would not have had the power to settle property rights permanently, because the decree asked was not for absolute divorce.

There is no evidence in the record of any agreement *in writing* in the part of appellee to hold in trust for appellant or herself the realty involved from which a tenancy by entirety was expressed or may be implied.

Section 1118, Code of Laws for the District of Columbia, 1901; Title 11, Sec. 3; Act of March 3, 1901; 31 Stat. 1367, c. 854 sec. 1117, provides:

“All declarations or creations of trust or confidence of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing or else they shall be utterly void and of no effect.”

Construing the above, this court in *McIntosh v. Green*, 25 App. D. C. 456 said:

“A Parol agreement whereby one is to purchase real estate with his own money, take title in his own name and hold it for the benefit of another is within the prohibition of the statute, and does not create a resulting trust.”

On this point the case of *O'Neil v. O'Neil*, 55 App. D. C. 40, 299 Fed. 914 cited at page 9 of appellant's brief is applicable, in which the court said:

“There was no agreement between the parties sufficient in terms for the creation of an express trust * * * and none would be implied from the circumstances.”

In the cases cited in appellant's brief *Moore v. Moore*, 51 App. D. C. 304, 278 Fed. 1017, and the related case *Osborne v. Osborne*, 59 App. D. C. 280, 40 Fed. (2d) 800, a joint tenancy was involved or a tenancy by the entirety. In each case the divorce was absolute and the ground was adultery. It is conceded that where property is purchased with

the husband's sole funds and the title taken in the joint names or in the wife's name, and later, she deserts her husband and an absolute divorce results because of failure to carry out matrimonial obligations, a court of equity will relieve the husband upon the theory that the consideration of transfer of title to the wife failed. The cases on this point are numerous and the rule is well established not only in the District of Columbia but in other jurisdictions. These cases are not applicable to the instant case. Here, the wife, appellee (plaintiff below), after applying for a limited divorce on the ground of desertion by the husband, later obtained an absolute divorce in another jurisdiction.

In his cross complaint appellant asked that the court settle his rights to *personal property* in the wife's possession. In the case of *Notes v. Snyder*, 55 D. C. Appeals 233, 4 Federal (2d) 426, 41 A. L. R. 1052, the rule was announced:

"Husband could not recover furniture purchased with joint funds from the wife's possession."

This court at page 234 said:

"The plaintiff could not recover, except upon proof of a right to immediate and exclusive possession of the property at the time of the commencement of the action (34 Cyc. 1386). The action does not lie for an undivided interest in personal property" (23 R. C. L. 862, 43 Cyc. p. 1359)."

In the written direction, signed jointly by appellant and appellee (R. 9) the real estate was "deeded to Anna Ra-peer *individually and in her own right*."

This constituted a gift from husband to wife.

In *Hinds v. Hinds*, 7 Mackey (18 D. C.) 85, the Supreme Court (now the U. S. District Court) said:

"A purchase of real estate with joint means of husband and wife and placing it in the wife's name imply a settlement by the husband on his wife of property to

every extent that the consideration came from him which will not be disturbed on a divorce being granted the wife."

In *Shea v. McMahon*, 16 App. D. C. 55, the court said:

"A conveyance of real estate by a husband to his wife whether made by a *voluntary settlement*, or on consideration of her relinquishment of her inchoate right of dower in other property is good against the husband and those claiming under him and vests title in the wife free from the husband's control and subject to her power of sale and devise."

In *Balston v. Cadick* (29 App. D. C. 405), this court said:

"Real estate transferred by a husband to his wife is a *gift to her*, although the title is passed through a third person as a medium of transfer."

In *Cohen v. Cohen* (1 App. D. C. 240) the court early announced the rule that such a transfer was presumed to be a gift, saying:

"Where a husband conveys land to his wife, the presumption is that it was a gift and after his death a trust therein in his favor cannot be established without the most convincing proof."

In *Zeust v. Staffin*, 14 App. D. C. 200, the court said:

"Where real estate is conveyed to a *feme covert* in fee simple absolute for her sole use and benefit free from the control of her husband she takes the estate in equity as if she were unmarried and has the right to dispose of it by deed or devise as a feme sole, without regard to any rights of her husband or her heirs at law."

Appellant seeks to establish a resulting trust in appellee. This identical issue was presented to this court in *McCartney v. Fletcher*, 11 Appeals D. C. 1. The husband had deeded his property to his wife on an alleged parol agreement that she should hold as trustee. It was asked, as here, for an accounting of rent and profits. The respondent

pleaded Sec. 7 of the statute of frauds "as a bar to an effort to engraft upon the deeds an express parol trust in favor of heirs of petitioner."

In *Sexton v. Wheaton* (8 Wheat. 229), which arose in the District of Columbia, Chief Justice Marshall said:

"It would seem to be a consequence of that absolute power which a man possesses over his own property that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair will be valid."

With respect of *Jackson v. Jackson* (91 U. S. 122 and 125; 123 Law Ed. 258), Mr. Justice Field stated:

"The circumstance that the grantee stands in one of these relations" (the case of husband for his wife, or a father for his child) "to the party is of itself sufficient evidence to rebut the presumption of a resulting trust."

On motion for reargument (overruled) in *McCartney v. Fletcher, supra*, on ground that the case was not within statute of frauds, Sec. 7.

Commenting on this the court said at page 20, 11 App. D. C. 1:

"Express trusts on real estate cannot be proved by parol; they must be by the terms of the Statute, *manifested or proved by some writing*, signed by the party to be charged by the trust—citing 1 Perry on Trusts, Sec. 79, 83. Pages 65, 70, 71; Browne on the Statute of Frauds (3rd edition). Sec. 105 to 109 and pages 98 to 101.

"*And the mere refusal of a supposed trustee to execute a parol trust or the denial of its existence is not such a fraud as will take the case out of the Statute of Frauds and authorize a court of equity to enforce the trust (Scott v. Harris, 113 Ill. 447), Farnham v. Clements, 51 Me. 426, to give effect to a mere parol trust as such case and on such ground would be a virtual repeal of the statute of frauds and to let in all the evils that were intended to be excluded by it.*"

In *Jackson v. Jackson*, 91 U. S. 122, 123 Law Ed. 258:

“An investment by the husband of money in the possession of the wife at the time of marriage, in the purchase and improvement of real estate for her separate use is valid if rights of creditors are not thereby impaired, the doctrine of resulting trusts does not apply to such a case. A divorce, if granted to the wife for cruel treatment by the husband is not of itself sufficient reason for awarding to him any portion of the property so settled upon her.”

In *Hinds v. Hinds*, 18 D. C. Rep. 85, Chief Justice Bingham said:

“We think the statute, as it was at the date of the decision in *Jackson v. Jackson* in this court did not authorize the Court to disturb a settlement voluntarily and duly made by a husband upon his wife after marriage *and before the cause of action arose* (italics ours) on which the divorce was granted. But as the law now stands all pretext for such holding is removed. That being true, we cannot grant the prayer of defendant, asking that a part of this property shall be given to him.”

The jurisdiction of the courts in divorce proceedings to adjust property rights between spouses or to make a division of their property upon dissolution of marriage is dependent upon local statutes, 17 Am. Juris. Sec. 445, at page 367, citing 29 A. L. R. 1371 annotations upon *Closson v. Closson*, 30 Wyo. 1, 215 Pac. 485. The jurisdiction in divorce actions in the District of Columbia are limited by the code. Jurisdiction of U. S. districts is a limited jurisdiction derived from statute and has never been exercised to settle property rights except in the two cases heretofore mentioned as limited by the code to absolute divorce or annulment and this practice generally prevails.

In North Carolina it has been held that there is no power in the court to settle property rights in an action for divorce *a mensa et thoro*. In the community property states such as California, where the court, in an interlocutory de-

cree has assumed to divide the property, such decree is not final and until final decree is entered does not settle the matter. It is subject to appeal but if not appealed from within the time allowed, is upheld as an acquiescence but if appealed from has invariably been held not final as a determination of property rights. By no line of reasoning is there authority for the statement that jurisdiction ever attached to the original suit for a limited divorce, to settle property rights finally. In some jurisdictions it has been held that the appearance of the same parties in the divorce proceeding in Florida and the decree which resulted abated the prior action begun in the District of Columbia. The instruction to the agents for the vendor of the real property in dispute at 1307 Rhode Island Avenue, signed by the appellant in which the appellee joined reads:

“We further authorize you to have the property deeded to Anna Pope Rapeer, *individually and in her own right.*”

In *Cheever v. Wilson*, 9 Wall. (U. S.) 108; 19 Law Edition 604, reported and annotated in LRA 1917 A 671, it was held that no particular words are necessary in a deed from husband to wife to create the estate in her, and that the words “For her sole and separate use” are sufficient.

“Law of Domestic Relations”, Schouler Page 222, Paragraph 233 (1905 Ed.):

“The effect of absolute divorce upon the property rights of married parties is substantially that of annihilation of the status. We speak here of *bona fide* and valid and complete decrees of dissolution * * * but modern statutes frequently regulate the subject locally.”

And section 234 of the same work:

“Divorce from bed and board, or nisi, produces, however, no such sweeping results; the cardinal doctrine here being that the marriage remains in full force, although the parties are allowed to live separate.”

THE CIVIL RULES OF PROCEDURE DO NOT AFFECT JURISDICTION OF THE DISTRICT COURT.

In the recent case of *Hunterman v. New Orleans Public Service, Inc., et al.*, the Circuit Court of Appeals, Fifth Circuit as late as May, 1941, 119 F. (2d) 465, said:

“The Federal Rules do not affect jurisdiction of District or appellate courts, Federal Rules of Civil Procedure, Rule 82, 28 U. S. C. A., following Sec. 723 c”.

And the court added:

“The Rules are not intended to affect jurisdiction of the District courts with whose procedure they deal” (119 Fed. (2d) at 465-466).

In *Stephenson v. Grand Trunk Western Railway Co.*, 110 Fed. (2nd) 401 the court said at page 405:

“It must be remembered that jurisdiction of Federal courts is solely a matter of Congressional bestowal and not subject to limitation by any other government agency”.

The effect of the new Rules of Civil Procedure upon jurisdiction is clearly defined by the opinion of this court in *Wise v. Herzog* reported in 72 App. D. C. 335, 114 Fed. (2nd) 486. This was an appeal from the Municipal Court involving Rule 9 of the Rules of Procedure in the Municipal Court, made pursuant to an act of Congress just as were the Rules of Civil Procedure invoked by appellant. This court said: “Properly construed it (Rule 9) neither *abridges* nor *extends* the jurisdiction of the court”.

The court therein fixed the standard. If the Rules of Civil Procedure could be construed, as appellant contends, to “nullify or repeal” the statute involved (Title 14, Sec. 69 (a) of the Code), the effect would be to “enlarge the jurisdiction” of the court beyond the limits fixed in the statute upon which the learned judge in the District court rested his order dismissing the cross complaint for want of jurisdiction.

The foregoing would seem to be sufficient answer to appellant's contention in his brief that the section of the D. C. Code (Title 14, Sec. 69 (a)) was "repealed or nullified by the act promulgating the rules and the rules thereunder".

The above section relied upon by the court below is still in the code. It confers a jurisdiction in actions for *absolute divorce or annulment*, to be exercised by the trial court in his discretion, in the exercise of broad equity powers. It limits the jurisdiction by providing that it may be exercised *at the time* of entry of a decree for annulment or *divorce a vinculo*. To contend that a rule of procedure promulgated by a committee appointed by the Supreme Court to revise civil procedure, even though a revision was undertaken under authority of Congress, is to suggest a delegation of legislative power repugnant to the U. S. Constitution. It is only according scant credit to the intelligence of the law makers to assume that they would give a roving commission to a co-ordinate branch of the government to make rules the legal effect of which would be to repeal statutes indiscriminately. To credit Congress with any such policy or intent would be to assume the bestowal of a legislative power to make rules that might repeal the entire code of laws of the District and substitute therefor Rules of Civil Procedure having the force and effect of substituted law.

The following citations are pertinent to the points suggested in appellant's brief:

"A co-defendant did not waive want of jurisdiction by answering defendant's cross claim".

Farr v. Detroit Trust Co., 116 Fed. (2d) 87 at page 817, citing *Morgan's La. T. R. & S. Co. v. Texas Central Ry.*, 137 U. S. 171-200, 11 Sup. Ct. 61, 34 L. Ed. 625, and *Kingsbury v. Buckner*, 134 U. S. 600-677, 10 Sup. Ct. 638, 33 L. ed. 1047.

"Appellee did not waive jurisdiction by answering appellant's cross claim".

Mitchell v. Maurer, 293 U. S. 237-244, 55 Sup. Ct. 162, 79 L. Ed. 338; *U. S. v. Carrick*, 298 U. S. 435-440, 56 Sup. Ct. 829, 80 L. Ed. 1263.

“The jurisdiction of the District court is only that conferred by the federal constitution or federal statutes”.

Noland v. Noland, 111 Fed. (2nd) 322, citing 28 U. S. C. A. Sec. 41. Judicial Code Sec. 24, as amended.

The new rules of Civil Procedure provide “no defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion”. Rule 12 (b) cited in recent D. C. appeals case *Schlayer v. Schlayer*, 71 App. D. C. 350, reported in 112 Fed. (2nd) 177, decided February 5, 1940 in which this court said:

“The act authorizing the formulation and promulgation of the rules (of Civil Procedure) provide that they shall neither abridge, enlarge nor modify any substantive rights of litigant”. Act of June 19, 1934 C. 651, Sec. 1, 48 Stat. 1064, 28 U. S. C. A. and 723 B.

“But when the effect of the change in rules of civil procedure is to nullify retroactively a jurisdiction perfected and complete in accordance with existing law * * * we think the application goes beyond the purpose of the rule and possibly of the statute which underlies it.”

THE DISTRICT COURT COULD DISMISS FOR WANT OF JURISDICTION UPON ITS OWN MOTION.

In support of the above the attention of the court is directed to the following: In *Page v. Wright*, 116 Fed. (2nd) 449, the question is discussed at length and authorities cited. In the syllabus the opinion of the court is reflected:

“The *duty* devolves upon Federal court at any time a jurisdictional question is presented to proceed no further until that question is determined, Jud. Code Sec. 37, 28 U. S. C. A.”

And to the suggestion of appellant of estoppel by the stipulation at pre-trial the syllabus speaks:

“Jurisdiction cannot be conferred upon Federal court by agreement, consent or collusion of the parties, whether contained in their pleadings or otherwise and a party cannot be precluded from raising jurisdictional question by any form of laches, waiver or estoppel, Jud. Code Sec. 37, 28 U. S. C. A. 80”.

The matter was considered and disposed of by the U. S. Supreme Court in *McNutt v. General Motors Accept. Corp.*, 298 U. S. 178, 80 Law Ed. 1115, from which the Circuit Court of Appeals Seventh Circuit in *Page v. Wright supra*, quotes freely. See also *Morris v. Gilmer* cited in the same opinion (129 U. S. 315, 9 Supreme Court 289, 32 Law Ed. 690).

In the recent case of *Hackner v. Guaranty Trust Co. of New York*, 117 Fed. (2nd) 95, Circuit court of appeals, second circuit, speaking through Justice Clark, said:

“* * * Jurisdictional issues may be raised by the court at any time on its own motion, *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 59 S. Court 744, 83 Law Ed. 1001; Federal Rule 12 (h) 28 U. S. C. A., following section 723 c”.

The Court of Appeals of the District of Columbia on April 10, 1939 in *Laughlin v. Cummings, U. S. Attorney General, et al.*, reported 79 D. C. App. 192, 105 Fed. Rep. (2nd) 71, opinion by the court said:

“Appellant contends that jurisdiction attached in this cause. He bases his contention upon the action of the judge of the District court in reading the complaint filed by appellant and in signing the rule to show cause.
* * * Lack of jurisdiction may be raised at any time whenever it affirmatively appears that the jurisdiction fails, the objection may be raised by the parties or by the court itself”.

Many cases are cited in the notes.

In *U. S. v. Klytia Corporation*, 121 Fed. (2nd) 473, on appeal from U. S. Customs Court, the Court of Customs and Patent Appeals say at page 483:

“During our study of the case we discovered a *jurisdictional* question in connection with the so-called duress entries which was not referred to by the tribunal of the Customs court and *which was not raised by counsel either below or here* but which, under numerous authorities, it is *our duty to raise sua sponte and act upon*”. (Citing *Morris v. Gilmer*, 129 U. S. 315, 325, 9 Sup. Court 289, 292, 32 Law Ed. 690.)

In the case cited the Supreme Court says:

“If the record discloses a controversy of which the court cannot properly take cognizance, its *duty* is to proceed no further and to dismiss the suit * * * The rule is inflexible and without exception” (Citing *Mansfield Coldwater etc. Ry. v. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510, 21 L. Ed. 462). “This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it”.

Many cases from U. S. Supreme Court cited.

In *Green v. Oberfeld*, 121 Fed. (2nd) 46, the Court of Appeals D. C. at page 54 of Federal Reporter the citation says:

Moreover, this defect of jurisdiction could not be remedied, as appellee contends by waiver upon the part of appellant, * * * waiver or consent cannot confer upon a court jurisdiction over the subject matter of the suit”. (Citing Fed. Rules of Civil Procedure, Rule 12 (b) 28 U. S. C. A. following Sec. 723 c.)

At common law and in equity in the absence of statute, an action or suit by a husband against his wife to establish title in the husband by resulting trust, was unknown. *Sacknoff v. Sacknoff*, 161 Atl. 669, 131 Me. 280; *Kuntz v. Kuntz*, 221 N. W. 285; 244 Mich. 78; *Rains v. Rains*, 46 Pac. (2d) 740, 97 Colo. 19. Although where the wife was charged with misconduct inconsistent with marital obligations, it has been held that an unfaithful wife may be held to account for property coming into her hands from her husband on the implied

agreement that she would remain constant. However, even these cases are decided only upon final decree for absolute divorce or after the bonds of marriage have been definitely and forever severed.

CONCLUSION.

The plaintiff complained in the court below and asked for a divorce *a mensa et thoro* and not for a divorce *a vinculo*. Had the case progressed to a decree in the court below there would not have been jurisdiction to settle property rights under the statute, from which the court derives its jurisdiction for it is expressly limited to a decree for divorce *a vinculo* or annulment and by implication at least excludes from a decree for limited divorce a settlement of property rights. The District Court of the District of Columbia, like all U. S. District Courts, is one of limited jurisdiction, such jurisdiction being purely statutory. Jurisdiction to settle property rights never did attach at any stage of the proceedings and the cross complaint which did not set up grounds for absolute divorce certainly did not confer the jurisdiction lacking.

The rules of Civil Procedure were designed to simplify procedure not to enact or repeal statutes. If Congress in authorizing the framing and enforcement of the new rules of civil procedure meant to confer on the judicial department of the government the power to make rules the effect of which would be either to make new statutes or repeal existing statutes by the mere adoption of the rules without further subsequent action by Congress, then it amounted to a delegation of legislative power, contrary to the constitution, and was void. If a change of the rule of procedure conceived and made effective by the judicial department of the Government alone, could repeal one law, the rules when thus made might even go further and repeal the entire code at the will of the courts approving the rules. The Supreme Court and Federal Courts have so often announced in the past that the constitutional power of the court was to

interpret the law and not to substitute the court's opinion for that of Congress as to the wisdom of the legislation that does not seem to require citation of authorities.

Discussion of the merits of the case would seem to be superfluous in view of the fact that the sole issue presented on appeal is as to the jurisdiction of the court. But it is important to make it clear that a joint tenancy or tenancy by the entirety is not involved. The Record discloses that the appellant after directing that the title be made to the wife unreservedly, explains that his reason for so doing was to prevent his creditors from seizing his property and to defeat orders of the court directing him to pay alimony to his first wife. As the learned justice at pre-trial observed, appellant does not come into the court with clean hands.

Respectfully submitted,

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